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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DONALD WAYNE HASS,

Defendant and Appellant.

E047475

(Super.Ct.No. FVI801782)

OPINION

APPEAL from the Superior Court of San Bernardino County. Miriam Ivy
Morton, Judge. Affirmed.

Eleanor M. Kraft, under appointment by the Court of Appeal, for Defendant and
Appellant.

No appearance for Plaintiff and Respondent.

INTRODUCTION

A jury found defendant and appellant Donald Wayne Hass guilty of driving under
the influence of alcohol with four prior convictions within the meaning of Vehicle Code

sections 23550 and 23550.5¹ (§ 23152, subd. (a), count 1), driving while having a .08 percent or higher blood alcohol content with four prior convictions within the meaning of sections 23550 and 23550.5 (§ 23152, subd. (b), count 2), and driving when his license has been suspended for a prior driving under the influence (DUI) conviction (§ 14601.2, subd. (a), count 3). The trial court found true the allegations that defendant had four prior DUI convictions, and that he had served one prior prison term within the meaning of Penal Code section 667.5, subdivision (b). The court sentenced him to a total of four years in state prison. Defendant apparently was out on bail and subsequently committed another section 23152, subdivision (a) offense, to which he pled guilty. The court then vacated the original sentence in the instant case, imposed a three-year term, and ran it consecutive to the sentence in the subsequent case, for a total term of five years eight months.

Defendant filed a timely notice of appeal. We affirm.

FACTUAL BACKGROUND

On August 11, 2008, around 4:00 p.m., Officer Michael Utakis responded to the scene of an accident in the parking lot of the WinCo shopping center in Apple Valley. Officer Utakis observed that the two vehicles involved in the accident were a Toyota Tundra truck (the truck) and a Honda Accord car. He found defendant in the driver's seat of the truck. When Officer Utakis approached defendant, the officer could smell alcohol

¹ All further statutory references will be to the Vehicle Code unless otherwise noted.

emanating from the cab of the truck. Officer Utakis called for a tow truck because he believed the accident was DUI related.

Officer Scott Nobles was also dispatched to the scene of the accident. Officer Nobles observed that defendant was very lethargic and sweating profusely, and his speech was slurred. Officer Nobles also noticed an odor of alcohol coming from the cab of the truck. Defendant told him that he had run out of gas, so his steering and brakes went out. Officer Nobles asked defendant to step out of the car and submit to some field sobriety tests. Officer Nobles observed defendant swaying from side to side. Officer Nobles instructed him to perform the Rhomberg test and explained that defendant needed to place his heels and toes together, put his hands down by his side, tip his head all the way back, close his eyes, and then count to himself for 30 seconds. Defendant said he understood the instructions, but he immediately widened the stance of his legs, placed one of his hands in between his eyes and pressed down, tipped his head back, and started counting out loud. Officer Nobles stopped defendant, repeated the instructions, and had him start over. Defendant did the same thing. Officer Nobles testified it was his opinion that defendant was under the influence of alcohol. Officer Nobles performed another sobriety test, and defendant's performance on that test also indicated he was under the influence of alcohol. Officer Nobles also attempted to administer a preliminary alcohol screening test, for which defendant was to blow into a machine that would record a reading of alcohol. Defendant put his mouth on the mouthpiece, but blew air out of the side of his mouth instead of into the machine. He then blew so lightly that the machine could not give a reading. Officer Nobles then placed defendant under arrest. Officer

Nobles testified that he observed the tow truck arrive and saw the tow truck driver start the truck and drive it up to the back of the tow truck.

Officer Nobles transported defendant to the jail and informed him that the sheriff's department administered blood tests or breath tests. Defendant insisted that he wanted a urine test. Officer Nobles said that was not an option. Officer Nobles also said he was not certified on the Breathalyzer machine at the jail, so defendant only had one option, which was a blood test. At trial, Officer Nobles testified that a law enforcement medical services nurse named Heather Lee drew defendant's blood sample. The blood was placed in a vial. Officer Nobles could not recall if the vial was marked. However, he recalled that the number of the blood alcohol kit used to package defendant's blood was 211332. Officer Nobles received the vial from Lee, placed it in the envelope of the kit, initialed it, brought it to the Apple Valley station, and placed it in the cooler in the property room.

At trial, Heather Lee confirmed that she took defendant's blood sample. She wrote defendant's name, date of birth, and case number on the blood alcohol kit. She also testified that the number on defendant's blood kit was 211332. She said she put his name, date of birth, the time the blood was drawn, and her initials on the vial.

Christy Keller, the criminalist who analyzed defendant's blood sample, also testified at trial. She said that the number on the vial was 211332. She did not recall any other information being on the vial. She assigned a case number for her lab, which was 08080561. The blood alcohol level on defendant's blood sample was .16 percent.

Ernest Schueman testified at trial as well. On the day of the accident, he was driving home with his wife when he observed defendant driving the truck. Schueman's

wife was driving their car. They were making a left-hand turn. There were two turn lanes, and they were in the outside lane, while defendant was in the inside lane. As Schueman's wife was making the turn, defendant was also turning, but he swerved into their lane. Because defendant was making a wide turn, Schueman and his wife "kept going further to the right" to avoid defendant. Defendant went back over to his lane, and they all proceeded down the road. Schueman told his wife to pull over and call somebody about defendant's driving because he was afraid defendant was going to hurt someone. They pulled into a shopping center parking lot and Schueman saw defendant's truck. Schueman then observed the truck collide with a car.

DISCUSSION

Defendant appealed, and upon his request, this court appointed counsel to represent him. Counsel has filed a brief under the authority of *People v. Wende* (1979) 25 Cal.3d 436 and *Anders v. California* (1967) 386 U.S. 738, setting forth a statement of the case and three potential arguable issues, including: 1) whether the trial court erred in admitting the results of the blood alcohol test; 2) whether the evidence was sufficient to support defendant's convictions; and 3) whether trial counsel rendered ineffective assistance of counsel (IAC). Counsel has also requested this court to undertake a review of the entire record.

We offered defendant an opportunity to file a personal supplemental brief, which he has done. In his lengthy handwritten brief, defendant sets forth his version of the facts and disputes portions of the transcript from the preliminary hearing. He also raises a myriad of issues, such as: 1) he had a right to have a choice of a breath or blood test;

2) the chain of custody as to his blood sample is in doubt; 3) Officer Nobles's testimony that he saw defendant's truck start up and drive onto the back of the tow truck was false; 4) the prosecutor dismissed the case and then refiled it; 5) there was some alleged confusion regarding the transfer of this case to Needles; and 6) the jury believed that Heather Lee was in error about her testimony that his name was on the vial; thus, the jury must not have taken into account her qualifications since it did not believe that she had done her job properly. Defendant has failed to make any legal arguments regarding these issues. To the extent defendant disputes the witnesses' testimonies, we reject such arguments, since "[w]e do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. [Citations.]" (*People v. Cochran* (2002) 103 Cal.App.4th 8, 13.)

Defendant further claims the prosecutor engaged in misconduct during his closing argument by using the following allegedly reprehensible and deceptive tactics: 1) the prosecutor argued that defendant tried to leave the scene of the accident, but there was no testimony in this regard; 2) he promoted Officer Nobles's alleged lies about seeing defendant's truck running; 3) when the prosecutor talked about the blood sample evidence, he stated that it was definitely defendant's blood; and 4) he coached Officer Nobles to lie.

A prosecutor's conduct violates California law if it involves the use of deceptive or reprehensible methods to attempt to persuade the jury. (*People v. Benavides* (2005) 35 Cal.4th 69, 108.) "[A] defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an

assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]’ [Citation.]” (*People v. Stanley* (2006) 39 Cal.4th 913, 952.) Defendant failed to timely raise these issues of alleged misconduct below. Accordingly, his claims on these points are forfeited. In any event, “[i]t is settled that a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.]’ . . . [Citation.]” (*People v. Wharton* (1991) 53 Cal.3d 522, 567.) The prosecutor’s arguments amounted to fair comment on the evidence. Moreover, there was no evidence that he “coached” Officer Nobles to lie on the stand, or that Officer Nobles even lied.

Finally, defendant complains that his counsel was very busy, never visited him to find out his side of the case, argued against admitting copies of the blood vial in the opening argument, should have brought up Officer Nobles’s testimony that the criminalist said there was a name on the vial, should have asked the criminalist why it took 14 days to test the blood and if the “blood equipment” was fixed properly after it was broken, and should have let the jury know that Officer Nobles violated his right to have a choice of a breath or blood test.

To the extent that defendant is claiming he received IAC, his argument fails. A defendant who claims IAC must establish that his counsel’s performance was deficient under an objective standard of professional competency, and that there is a reasonable probability that but for counsel’s errors, a more favorable determination would have resulted. (*People v. Holt* (1997) 15 Cal.4th 619, 703.) If the defendant makes an

insufficient showing on either one of these components, the claim fails. (*Ibid.*) Here, defendant has failed to establish either component. Thus, his claims of IAC fail.

Pursuant to the mandate of *People v. Kelly* (2006) 40 Cal.4th 106, 110, we have independently reviewed the record for potential error.

We have now concluded our independent review of the record and found no arguable issues.

DISPOSITION

The judgment is affirmed.

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HOLLENHORST

Acting P. J.

We concur:

MCKINSTER

J.

MILLER

J.